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Supreme Court, U.S.
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No. 91-1804

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSE ELIGIO VELEZ and ELBA ZAYAS,
Petitioners,

v.

LYDIA FELIX DE SANTANA,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL QUESTIONS PRESENTED

1. Are private persons, accused of exercising governmental functions pursuant to an alleged conspiracy violative of 42 U.S.C. sec. 1983, entitled to assert a qualified immunity defense?

2. Does this Court's functional approach to immunities under 42 U.S.C. sec. 1983, mandated by *Butz v. Economou* and its progeny, apply to private persons accused of exercising governmental functions pursuant to an alleged conspiracy violative of that statute?

3. Does this Court's recent decision in *Wyatt v. Cole*, which held that private defendants who use a state's unconstitutional attachment statute are not protected by qualified immunity under 42 U.S.C. sec. 1983, apply to private persons accused of exercising governmental functions pursuant to an alleged conspiracy violative of that statute?

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Petitioners submit this Supplemental Brief in support of their Petition for Writ of Certiorari, filed on May 4, 1992, because of this Court's May 18, 1992, decision in *Wyatt v. Cole*, 112 S.Ct. ____, 60 U.S.L.W. 4359 (1992), discussed later. Respondent de Santana did not timely file her Reply Brief. After this Court requested that she file it, she asked for and received an extension of time until July 26, 1992. She will therefore receive this Supplemental Brief in sufficient time to respond both to it and to the earlier Petition for Writ of Certiorari.

SUPPLEMENTAL STATEMENT OF THE CASE

As set out in considerably greater detail in their Petition for Writ of Certiorari previously submitted in this case, petitioners Jose Eligio Velez and Elba Zayas, both private parties, were sued under 42 U.S.C. sec. 1983 for damages by Lydia Felix de Santana for their alleged conspiracy with a Puerto Rico Assistant District Attorney to bring baseless criminal charges against her. This conspiracy, characterized as a sec. 1983 "malicious prosecution" action, supposedly deprived de Santana of her substantive due process rights. Significantly, the conduct alleged against the petitioners consisted in their taking control of a criminal investigation and, in so doing, exercising governmental functions.

Petitioners moved for summary judgment on the qualified immunity ground that sec. 1983 "malicious prosecution" law was not clearly settled at the time of the alleged conduct in 1986 and 1987. The district court denied that motion and the petitioners appealed to the First Circuit pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Among other arguments, the petitioners expressly raised the contention that even though they were private parties, they were entitled to qualified immunity under this Court's functional approach to immunities pursuant to *Butz v. Economou*, 438 U.S. 478 (1978), inasmuch as they were charged by de Santana with exercising governmental functions.

However, the First Circuit ruled against the petitioners and affirmed the district court on the ground that private defendants who "voluntarily engage[ ] in illegal activities in the advancement of their own self-interests" are not entitled to qualified immunity. Appendix to Petition for

Writ of Certiorari at p. 10. The First Circuit thereby rejected the petitioners' governmental functions argument.

Petitioners thereupon filed their Petition for Writ of Certiorari on May 4, 1992. They specifically tied the Questions Presented in their Petition to the Question Presented in this Court's prior grant of certiorari in *Wyatt v. Cole*, No. 91-126, because *Wyatt* had not been decided by May 4, 1992. However, on May 18, 1992, this Court held in *Wyatt*, over a dissent by Chief Justice Rehnquist and Justices Souter and Thomas, that private persons accused of violating sec. 1983 by using unconstitutional state attachment statutes are not protected by qualified immunity. Justices Kennedy and Scalia concurred.

It may appear at first blush that this Court's decision in *Wyatt* effectively undermined the petitioners' argument and, as a result, their Petition for Writ of Certiorari as well. But they maintain that *Wyatt* did not do so for a simple reason: *unlike this case, Wyatt did not involve a sec. 1983 conspiracy claim based upon the exercise of governmental functions.* This Court's reasoning in *Wyatt* does not and should not apply to private defendants accused of violating sec. 1983 through the exercise of governmental functions. Indeed, to apply *Wyatt* to this case would be inconsistent with this Court's own case law which has consistently adopted a functional approach to immunities. *See Butz v. Economou, supra.*

For the following reasons, petitioners in this Supplemental Brief ask this Court, even after *Wyatt v. Cole*, to grant certiorari to deal with important issues not addressed by that decision.

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

I.

THIS FIRST CIRCUIT CASE RAISES AN IMPORTANT QUALIFIED IMMUNITY/PRIVATE PERSON ENTITLEMENT QUESTION NOT DEALT WITH BY THIS COURT'S RECENT DECISION IN *WYATT v. COLE*.

This Court ruled in *Wyatt v. Cole*, 112 S.Ct. ____, 60 U.S.L.W. 4383 (1992), that private defendants accused of using an unconstitutional state attachment statute are not protected by qualified immunity. In light of the concurring and dissenting opinions in *Wyatt*, this Court rendered what it called a "narrow" decision on the "precise" question of "whether qualified immunity, as enunciated in *Harlow*, *supra*, is available for private defendants faced with sec. 1983 liability for invoking a state replevin, garnishment or attachment." 112 S.Ct. at ____, 60 U.S.L.W. at 4386. While it answered that question in the negative, this Court did not deal with the different question raised by this case: are private persons accused of violating sec. 1983 through their allegedly conspiratorial exercise of governmental functions entitled to assert qualified immunity?

Unlike the private defendants in *Wyatt*, the petitioners did not use a state attachment statute for their private commercial purposes. Rather, according to de Santana's own complaint and the district court's characterization of petitioners' allegedly unconstitutional conduct, they exercised governmental functions in connection with the investigation of de Santana. Nevertheless, the First Circuit rejected this functional argument of the petitioners and held that they were not entitled to assert qualified immunity.

That the petitioners allegedly exercised governmental functions is crucial because, as discussed next, this Court in sec. 1983 cases has regularly insisted on the application of a functional approach to immunities.

II.

THE FIRST CIRCUIT'S DECISION IN THIS CASE IS INCONSISTENT WITH THIS COURT'S FUNCTIONAL APPROACH TO IMMUNITIES AS ARTICULATED IN *BUTZ v. ECONOMOU* AND ITS PROGENY.

This Court's functional approach to immunities, derived from *Butz v. Economou*, 438 U.S. 478 (1978), emphasizes function over status and makes clear that it is not the person who is protected but rather the governmental function he or she performs. *See, e.g., Forrester v. White*, 484 U.S. 219 (1988), which applied qualified, not absolute, immunity to the administrative conduct of a judge. Petitioners submit here, as they did in the First Circuit, that since they allegedly functioned as governmental officials acting under color of law, their conduct should be protected by the same qualified immunity rules that are applicable to governmental officials, as set out in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987).

Significantly, the First Circuit itself, soon after holding in this case that the petitioners were not entitled to qualified immunity, ruled in another case that private defendants, employees of private agencies under contract with a state agency to perform certain social service functions, were protected by qualified immunity. *Frazier v. Bailey*, 957 F.2d 920 (1st Cir. 1992). The First Circuit's rationale was that the defendants "were under contract to perform the duties statutorily required of the state." *Id.* 928. It

went on to explain that the defendants "were performing duties that would otherwise have to be performed by a public official who would clearly have qualified immunity."

The First Circuit in *Frazier* applied the Tenth Circuit's reasoning in *DeVargas v. Mason & Hangar-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988), a case similarly conferring qualified immunity on private defendants under contract with government. *See also Mello Rodriguez v. Furtado*, 950 F.2d 805 (1st Cir. 1991), ruling that a doctor under court order to perform a vaginal cavity search was entitled to assert qualified immunity.

With all respect to the First Circuit, it adopted the proper functional approach in *Frazier* and *Mello Rodriguez*—as did the Tenth Circuit in *DeVargas*—while inexplicably refusing to do so in this case. *For qualified immunity purposes, there should be no difference between a contract with government under which private defendants voluntarily exercise governmental functions, and an informal agreement (an alleged conspiracy) with government under which private defendants similarly exercise governmental functions.* Perhaps, as suggested by petitioners in their Petition for Writ of Certiorari at p. 11, note 11, the First Circuit was misled by the allegations of "conspiracy," with its connotations of bad faith and evil motive.

Conferring qualified immunity protection of private defendants accused of conspiracy under sec. 1983 in connection with their exercise of governmental functions would be consistent with this Court's historical approach to immunities in *Wyatt v. Cole*. There, this Court was reluctant to adopt a predominantly policy oriented approach to qualified immunity for private defendants and instead opted for a more historically based approach.

Petitioners previously offered various policy arguments of fairness, individual autonomy and the public interest in law enforcement, in support of conferring qualified immunity in this case. See Petition for Writ of Certiorari at pp. 12-14. Without at all abandoning these arguments, they wish to emphasize that they also made several historically grounded arguments, including the contention that the appropriate historical analogy to qualified immunity for private defendants was to the common law of torts in general. Thus, Petitioners contended in their Petition for Writ of Certiorari, *id.* at 15, note 13, that

> [b]oth negligence and contributory negligence are generally considered to be objective in nature, focusing on the reasonableness of the challenged conduct in a manner comparable to the objective reasonableness of the qualified immunity test as set out in *Anderson v. Creighton*, 483 U.S. 635 (1987).

This "background of tort liability" argument, *see Monroe v. Pape*, 365 U.S. 167, 187 (1961), should apply to private defendants sued under sec. 1983 for their allegedly unconstitutional exercise of governmental functions.

Consequently, inasmuch as this Court's recent decision in *Wyatt v. Cole* did not address the qualified immunity issue raised by the First Circuit's decision in this case, and because the First Circuit's decision is inconsistent with this Court's functional approach to immunities, certiorari should be granted.

CONCLUSION

The question of reconciling this Court's qualified immunity/private person entitlement decision in *Wyatt v. Cole* with its functional approach to immunities is squarely presented by this case. Moreover, this question is bound to recur frequently and should be addressed expeditiously in order to eliminate as much ambiguity as possible in this important qualified immunity setting. Indeed, the problem is exacerbated because of the ease with which conspiracies can be alleged by sec. 1983 plaintiffs under *Dennis v. Sparks*, 449 U.S. 24 (1980), so as to end-run sec. 1983's color of law requirement. Frankly, that is just what happened to the petitioners in this case.

For all these reasons, petitioners in this Supplemental Brief respectfully ask this Court to grant certiorari. In the alternative, petitioners request that this Court vacate the decision of the First Circuit and remand for consideration in light of the narrow decision in *Wyatt v. Cole* and this Court's long-standing functional approach to immunities.

Respectfully submitted,

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